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Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

11 CR 1091

5 PETER J. LESNIEWSKI,

6 Defendant.

7 -----x

8 New York, N.Y.
9 February 21, 2014
11:37 a.m.

10 Before:

11 HON. VICTOR MARRERO,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

United States Attorney for the
Southern District of New York

16 DANIEL TEHRANI

17 NICOLE FRIEDLANDER

Assistant United States Attorneys

18 DURKIN & ROBERTS

Attorneys for Defendant

19 THOMAS ANTHONY DURKIN

20 JOSHUA L. DRATEL, P.C.

Attorneys for Defendant

21 LINDSAY A. LEWIS

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1 (In open court)

2 THE COURT: Good morning. Please be seated. This is
3 a proceeding in the matter of *United States v. Lesniewski*.
4 It's docket number 11 CR 1091. And we'll schedule as the set
5 defendant in this matter.

6 Counsel, please enter your appearances for the record.

7 MR. TEHRANI: Good morning, your Honor. Daniel
8 Tehrani and Nicole Friedlander for the government.

9 THE COURT: Good morning.

10 MR. DURKIN: Good morning, Judge. Tom Durkin and
11 Lindsay Lewis on behalf of Dr. Lesniewski, who's present.

12 THE COURT: Good morning. The Court notes that the
13 defendant is present in the courtroom seated next to his
14 attorneys.

15 I have read and reviewed the presentence investigation
16 report dated December 5, 2013, prepared in connection with
17 today's sentencing of Dr. Lesniewski. I have also read the
18 memorandum from defense counsel dated February 14th, 2014, and
19 the memorandum from the government dated February 20, 2014.

20 Mr. Tehrani, has the government read and reviewed the
21 presentence report?

22 MR. TEHRANI: Yes, your Honor.

23 THE COURT: Does the government have any objections to
24 the report to raise at this point?

25 MR. TEHRANI: No, your Honor.

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1 THE COURT: Thank you.

2 Mr. Durkin, have you read and reviewed the presentence
3 report?

4 MR. DURKIN: Yes, Judge.

5 THE COURT: Have you had an opportunity to discuss it
6 with Dr. Lesniewski?

7 MR. DURKIN: We have.

8 THE COURT: Do you have any objections to the report
9 that you wish to raise at this point?

10 MR. DURKIN: Nothing other than what we previously
11 filed, Judge, which is attached to our sentencing submission.
12 I think probation responded to it and we have nothing further
13 on that.

14 THE COURT: Thank you.

15 I'll ask Dr. Lesniewski to please rise.

16 Have you read and reviewed the presentence report?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you had an opportunity to discuss it
19 with your attorney?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Thank you. You may be seated.

22 On August 6, 2013, Dr. Lesniewski was found guilty by
23 a jury verdict of Counts One, Three, Seven, Eight, Nineteen,
24 Twenty, Twenty-two, Twenty-six, Twenty-seven and Thirty of
25 Indictment No. 11 Cr. 1091, which charged him with conspiracy

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1 to commit mail fraud, wire fraud, and health care fraud in
2 violation of 18 U.S.C. 1349, a Class C felony; conspiracy to
3 defraud the United States Railroad Retirement Board in
4 violation of 18 U.S.C. Section 371, a Class D felony; health
5 care fraud in violation of 18 U.S.C. 1347, a Class C felony;
6 and mail fraud in violation of 18 U.S.C. 1341, a Class C
7 felony.

8 Mr. Tehrani, does the government have any additional
9 comments for the Court's consideration in connection with
10 sentencing?

11 MR. TEHRANI: Your Honor, just very briefly. As the
12 trial evidence in this case showed, Dr. Lesniewski and the
13 other disability doctors in this case were the linchpins of a
14 massive disability fraud at the Long Island Railroad. The
15 losses attributable to Dr. Lesniewski alone were nearly \$100
16 million. And without the participation of Dr. Lesniewski and
17 other corrupt doctors, who were willing to subvert their
18 medical licenses in the cause of fraud, a fraud of this type, a
19 fraud of this scale, simply could not exist.

20 And for those reasons, your Honor, and for the reasons
21 set out in much more length in the government's submission, the
22 government respectfully believes that a guidelines sentence is
23 appropriate in this case.

24 THE COURT: All right. Thank you.

25 Mr. Durkin, do you have any additional comments for

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1 the Court's consideration in connection with sentencing?

2 MR. DURKIN: Judge, I have one housekeeping matter
3 that Ms. Lewis could address regarding the financials. We have
4 them and we've sent a copy to probation.

5 MS. LEWIS: Your Honor, I just wanted to let you know
6 that we prepared the financial affidavits that are typically
7 required as part of the PSR, although at the time we did note
8 that it would probably take us considerably longer than usual
9 to prepare them. And we actually did so after receiving the
10 final PSR.

11 And so in light of that, we don't expect that they
12 would be incorporated into the PSR in any way unless of course
13 the Court wanted them to be. So we just have a copy here for
14 the Court today as a courtesy if the Court does want them and,
15 also, we have e-mailed a copy to probation. I've also reached
16 out to probation, to Mr. Kapitansky asking whether he would
17 like a copy by hand -- there are about 35 exhibits to this --
18 and have not heard back. So I'm prepared to provide that.

19 But for today we were just providing them here, if the
20 Court wants them, and not with any expectation that they'll
21 factor into sentencing in any way beyond that.

22 THE COURT: Thank you.

23 The Court will direct that the materials be included
24 as part of the record of this proceeding.

25 MR. DURKIN: Thank you, Judge. And we're not

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1 suggesting we change anything.

2 THE COURT: Fine.

3 MR. DURKIN: Judge, I have a couple of comments,
4 briefly. First, there are 16 people here that wrote letters.
5 They are seated here. I can introduce them to you
6 individually. They are willing to testify if you wanted them
7 to, but I don't imagine there will be any --

8 THE COURT: If the letters are already in the record,
9 the Court has considered them.

10 MR. DURKIN: Yes. Thank you.

11 I did not get a chance to respond to the government's
12 filing, and I'm not complaining about that. There was a bit of
13 a mixup. We delivered a copy to Mr. Weddle. It turned out Mr.
14 Weddle was out of town. So in fairness to Ms. Friedlander and
15 Mr. Tehrani, they didn't get it until Tuesday. So I'm not
16 complaining in any way. We addressed it to Mr. Weddle and we
17 forgot to put their names on it. I don't know whether it would
18 have gotten there anyway because it would have gone to Weddle
19 first.

20 I made the suggestion that I thought from a
21 proportionality standpoint, my recommendation of two and a half
22 years, which I know is far from the guidelines, did make
23 certain sense. The government says it doesn't make any sense.
24 But it seemed to me they had two arguments for that. One was
25 that Dr. Ajemian had accepted responsibility, which I would

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1 only note the government took a different position in in its
2 pleadings. And I think the Court itself commented on it in
3 your sentencing comments.

4 I would only refer the Court to the government's
5 sentencing memorandum in the Ajemian case, pages, 17, 20, and
6 14, where they essentially argued that he was blaming the
7 victims and not accepting responsibility. And your Honor
8 pointed that out in your sentencing comments. And I don't say
9 this to disparage Dr. Ajemian or anyone else, but I believe
10 that there may well be a significant difference between
11 somebody who simply exercises his due process right to go to
12 trial -- as you know, we put on no evidence. We did not
13 challenge it. We're accepting of the verdict and we are not
14 taking any positions contrary.

15 So I think it's a little incongruous that somehow
16 Dr. Ajemian accepted responsibility. Maybe he did, maybe he
17 didn't. That's not my point. But my point is I think there
18 is, from a proportionality standpoint and from the standpoint
19 of individual sentencing, I think the suggestion that I make to
20 you, that if 46 percent of this fraud, which the government
21 argued for Dr. Ajemian was almost half of the fraud, merits
22 eight years, then I think there is some substance to the
23 suggestion that Dr. Lesniewski's sentence of 30 months, as I've
24 suggested, is not unreasonable, or something close to that.

25 I think there should be some proportionality and I

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1 think the individualized factors should make a difference. And
2 I certainly don't think -- and I certainly trust that your
3 Honor won't hold it against him for going to trial. I
4 understand that that raises our guideline level, but
5 nonetheless we're still talking about 3553(a).

6 The second point the government argued is that somehow
7 you heard the trial evidence. And while I understand you heard
8 the trial evidence, I think that the trial evidence-- and
9 that's why I submitted two exhibits. The government's
10 percentage exhibit, but I also significantly pointed out to
11 you, and I think it's significant, that this was not
12 Dr. Lesniewski's sole practice.

13 And that's not to deprecate the seriousness of the
14 offense in any way, shape or form. And I hope I made that
15 clear throughout my pleading. I'm only talking in mitigation.
16 I'm not talking in any way that this isn't serious or that the
17 doctor doesn't bear a certain responsibility based on the
18 verdict. There's no question about that. We're not fighting
19 that.

20 But what I'm suggesting is that if you take all the
21 3553(a) factors and you combine it with the, I think,
22 relatively small portion of money that he was receiving, which
23 is set forth-- and I know your Honor paid careful attention to
24 it at trial because we had so many arguments over it, defendant
25 Exhibit L24. But if you compare \$286,000 to \$4,391,000, that's

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1 an awfully small percentage.

2 And, again, it's not to deprecate the seriousness of
3 the offense, but Dr. Lesniewski did have more than just the
4 Long Island Railroad practice. He had a substantial surgery
5 practice. I know the government quarrels with that, over the
6 malpractice insurance issue, but we've argued that to you and I
7 don't think we need to revisit that again today. You've heard
8 all the evidence. There's no doubt this is a serious offense.
9 No doubt punishment is in order. No doubt a prison sentence is
10 in order.

11 But the real question becomes: What do we do
12 proportionately and comparatively in a scheme like this where
13 there's various different levels of participation? And what do
14 you do to a man who's 63 years old, has some health problems.
15 They're not debilitating, but I think to suggest that 30 months
16 even would be a slight sentence is inaccurate as far as I'm
17 concerned. I always count three Christmases away from your
18 family when you're 63 years old is significant punishment.

19 I understand there's deterrents. There's general
20 deterrents and there's individual deterrents. I certainly
21 don't think that in any way, shape or form a sentence of close
22 to three years would be a sentence that wouldn't deter. I
23 don't think there's anybody out there that's going to start
24 calculating and decide, well, you know, I'm going to
25 participate in this type of fraud just for the sake of if I

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1 only get three years versus six or eight or whatever.

2 So with that, Judge, I would simply ask you to temper
3 your sentence with mercy. You gave us-- I know how carefully
4 you followed this trial. I think you saw the evidence.
5 Dr. Lesniewski has great respect for you, for the Court, and we
6 accept the verdict and he will accept your sentence. He's a
7 man of great faith, as all the letters indicate. He will
8 accept your sentence. I would simply ask you to temper it with
9 mercy.

10 Thank you.

11 THE COURT: Thank you.

12 Dr. Lesniewski, please rise. Is there anything you
13 would like to say on your behalf before the Court imposes
14 sentence?

15 THE DEFENDANT: No at this time, sir.

16 THE COURT: Thank you. You may be seated.

17 In accordance with the decision by the United States
18 Supreme Court in the *United States v. Booker*, while the United
19 States Sentencing Guidelines are not mandatory, the Court
20 nonetheless must consult those guidelines and take them into
21 account while sentencing. Therefore, this Court has considered
22 the findings of fact stated in the presentence report, as well
23 as the guidelines analysis and recommendations contained
24 therein. The Court has weighed this information along with the
25 factors listed in 18, United States Code, 3553(a) in coming to

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1 its final sentencing decision.

2 The Court adopts the factual recitation in the
3 presentence investigation report. Therefore, the Court finds
4 that under the guidelines, Dr. Lesniewski's offense level
5 amounts to 33 and his criminal history falls into category 1.
6 The recommended range of imprisonment for that offense level
7 and criminal history category is 135 to 168 months'
8 imprisonment.

9 Dr. Lesniewski was found guilty of conspiracy to
10 commit mail fraud, wire fraud, and health care fraud,
11 conspiracy to defraud the United States Railroad Retirement
12 Board, health care fraud and mail fraud. The probation office
13 has recommended that the Court impose a sentence of 135 months
14 on Counts One, Twenty-six, Twenty-seven and Thirty to be served
15 concurrently.

16 Subsection (A)(1) of 18 U.S.C. 3553 requires that
17 courts take into consideration the nature and circumstances of
18 the offense and the history and characteristics of the
19 defendant. Subsection (A)(2) of 18 U.S.C. Section 3553
20 requires that the Court consider the need for the sentence to
21 promote certain objectives of the criminal justice system,
22 namely: Punishment, specific and general deterrence, and
23 rehabilitation. Pursuant to Section 3553(a)(6), the Court is
24 also directed to consider the need to avoid unwarranted
25 sentencing disparities among defendants with similar records

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1 and similar offenses in other cases, as well as in connection
2 with the case at hand.

3 Dr. Lesniewski, please rise.

4 Taking into account the nature and circumstances of
5 the offense and the history and characteristics of the
6 defendant, and the Court finds that a sentence of 96 months'
7 imprisonment is reasonable and appropriate, in that such terms
8 are sufficient, but not greater than necessary to promote the
9 proper objectives of sentencing.

10 In imposing this sentence, I have taken into account
11 the defendant's post-arrest rehabilitation; the relative roles
12 of this defendant in relation to that of Dr. Ajemian and
13 Mr. Rutigliano; the loss amounts that are involved which, to
14 some extent in cases such as this, may be either imprecise or
15 difficult to apportion among different defendants. I've taken
16 into account the record of good works of the defendant as set
17 forth by those who have written in his support and the
18 defendant's age.

19 I've also taken into account the sentences that the
20 Court imposed upon Dr. Ajemian and Mr. Rutigliano. Dr. Ajemian
21 did not go to trial. He accepted responsibility, but in
22 relation to the extent of the offense, the trial record
23 indicated that Dr. Ajemian had a much more extensive practice
24 in this fraud than did Dr. Lesniewski.

25 Dr. Ajemian was sentenced to 96 months.

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1 Mr. Rutigliano, who similarly went to trial, was sentenced to
2 96 months. It is the Court's view that, taking into account
3 all of the personal circumstances, the unique roles of each of
4 these individuals in the offense, the loss amounts that were
5 attributable to their individual participations would not
6 warrant any disparity in the sentences among them.

7 I believe, Mr. Durkin, that a 30-month sentence, as
8 you proposed, would be an unwarranted disparity with the
9 sentences that the Court has imposed on defendants who the
10 Court believes are similarly situated in many ways to that of
11 Dr. Lesniewski. It would not be equitable under these
12 circumstances to sentence Dr. Ajemian and Mr. Rutigliano to 96
13 months and Dr. Lesniewski, as you suggest, to a term of 30
14 months.

15 Upon your release from imprisonment, Dr. Lesniewski,
16 you shall be placed on supervised release for a term of three
17 years. I will indicate that the sentence of 96 months is on
18 all of the counts, each of the counts to run concurrently.

19 The PSR recommends imposition of a fine of \$25,000. I
20 will not impose a fine in light of the defendant's substantial
21 restitution and other financial obligations that are involved
22 in this case.

23 The restitution amounts, according to the government's
24 calculation, shall be paid to the United States District Court,
25 the Clerk of the Court for this district, for disbursement to

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1 the following victims in the amounts stated: Railroad
2 Retirement Board Disability Benefits, \$68,131,127; Railroad
3 Retirement Board Sickness Benefits, \$1,301,564; AFLAC,
4 \$792,047; UNUM, \$111,767; United Healthcare, \$296,395, for a
5 total of \$70,632,900.

6 MR. DURKIN: Judge, would you repeat the last figure
7 again?

8 THE COURT: The total amount is \$70,632,900.

9 (Pause)

10 THE COURT: Let me come back for a correction. Count
11 Three, which is defrauding the Railroad Retirement Board,
12 carries a maximum of five years. So the Court will impose a
13 sentence on that count of a five-year maximum, again to run
14 concurrently with the others.

15 Dr. Lesniewski, you're also ordered to pay to the
16 United States a special assessment which is mandatory and which
17 shall be due immediately of \$1,000.

18 Mr. Tehrani, is there a forfeiture in this case in
19 addition to the restitution?

20 MR. TEHRANI: Yes, your Honor. We don't have an order
21 to give you now. We will, of course, provide one shortly. But
22 we ask for forfeiture in the amount of \$70,947,699. And the
23 basis for that is set forth in Exhibit A of our sentencing
24 submission.

25 THE COURT: All right.

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1 MR. DURKIN: Judge, we will make no further objection
2 than what we did in our objection to the PSR.

3 THE COURT: All right. Thank you.

4 MR. DURKIN: We would object.

5 THE COURT: The Court will order that there be
6 forfeiture in the amounts indicated in the forfeiture order
7 which the government will submit and the Court will endorse.

8 MR. DURKIN: And the Court will at least note our
9 objection on that.

10 THE COURT: The Court will note the objections of the
11 defendants.

12 MR. DURKIN: Thank you.

13 THE COURT: Dr. Lesniewski, you must comply with
14 standard conditions 1 through 13 of supervised release and the
15 following mandatory conditions: You shall not commit another
16 federal, state or local crime; you shall not illegally possess
17 a controlled substance; you shall not possess a firearm or
18 destructive device; you shall cooperate in the collection of
19 DNA as directed by the probation officer.

20 The mandatory drug testing condition is suspended
21 based on the Court's determination that you pose a low risk of
22 future substance abuse.

23 In addition, you shall obey the following special
24 conditions: You shall provide the probation officer with
25 access to any requests for financial information; you shall not

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1 incur any new credit card charges or open additional lines of
2 credit without the approval of the probation officer unless
3 you're in compliance with the installment payment schedule.

4 Dr. Lesniewski, do you understand each of those
5 conditions?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: You shall report to the nearest probation
8 office within 74 hours from release of custody.

9 The Court recommends that you be supervised by the
10 district of residence.

11 The sentence as stated is imposed.

12 Dr. Lesniewski, to the extent that you have a right to
13 appeal your sentence and you are unable to pay the cost of an
14 appeal, you have the right to apply for leave to appeal *in*
15 *forma pauperis*, meaning as a poor person. If you make such a
16 request, the clerk of the court must immediately prepare and
17 file a notice of appeal on your behalf.

18 Do you understand your right to appeal to the extent
19 that it may exist?

20 THE DEFENDANT: Yes.

21 THE COURT: Mr. Tehrani, is there anything else--
22 first, are there any remaining counts or underlying indictments
23 that need to be dismissed at this time?

24 MR. TEHRANI: Yes. The government moves now to
25 dismiss all open counts against Dr. Lesniewski.

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1 THE COURT: It will be so ordered.

2 Anything else from the government?

3 MR. TEHRANI: Yes, your Honor. Just on the latest
4 objection. Mr. Durkin has relied on objections previously
5 submitted to the Court. And in adopting the guidelines set
6 forth in the PSR as well as adopting or setting restitution
7 of forfeiture amounts, we just wanted to clarify for the
8 record -- or inquire of your Honor for the record that you
9 are-- just to confirm that you're denying those objections and
10 adopting the numbers in the PSR as set forth in the
11 government's submissions for the reasons set forth by both
12 probation and the government.

13 THE COURT: In adopting the PSR, I made an implicit
14 finding that those amounts are approved and the defense
15 objections denied.

16 MR. TEHRANI: Thank you, your Honor.

17 THE COURT: All right.

18 MR. DURKIN: Judge, a couple of matters, Judge.

19 THE COURT: Can you propose a self-surrender date?

20 MR. DURKIN: Judge, I did. I spoke to the prosecutors
21 about it. I understand it's normally about 90 days, but we
22 have a special request that I don't believe the government has
23 an objection to. Dr. Lesniewski has a daughter in Australia
24 who is pregnant. She had hoped to be here today and to see her
25 father before he surrenders, but she's had some serious

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1 complications with the pregnancy.

2 And I believe-- I don't believe. I have letters from
3 her doctors saying she's not permitted to travel whatsoever. I
4 think she's due to deliver towards the end of June. I
5 discussed with the government if we could have a surrender date
6 towards the last part of July, and I believe that's acceptable
7 to the government.

8 THE COURT: Mr. Tehrani?

9 MR. TEHRANI: No objection, your Honor.

10 MR. DURKIN: Judge, we would also request that you
11 make a recommendation for Otisville, New York.

12 THE COURT: The Court will so recommend.

13 Do we have a date in July?

14 THE DEPUTY CLERK: July 29th?

15 MR. DURKIN: What day of the week is that?

16 THE DEPUTY CLERK: Tuesday.

17 MR. DURKIN: That should be fine. That's fine. Thank
18 you.

19 THE COURT: Dr. Lesniewski, you're ordered to report
20 to the facility designated by the United States Bureau of
21 Prisons by noon on July 29th, 2014. If no facility has been
22 designate by the BOP on that date, you are directed to report
23 on that date by noon to the United States Marshal for this
24 district. Your failure to do so will subject you to
25 prosecution for offenses separate and apart from those for

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1 which you've been sentenced today, and the punishment can be
2 severe.

3 Do you understand this?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You shall remain out on bail under the
6 same terms and conditions that apply to date. Again, any
7 violation of the conditions of bail can be to severe
8 consequences.

9 Do you understand this?

10 THE DEFENDANT: Yes.

11 MR. DURKIN: Judge, there's one issue with the
12 conditions as they exist right now. And I forgot to mention
13 this to the government, but we have had discussions earlier.
14 Dr. Lesniewski -- his wife has a condition of the bail. She's
15 a co-signer. And she represented that she would make no
16 transfers without us talking to the government.

17 The government had made an exception for legal fees
18 and they said as long as we notified them. There will need to
19 be more legal fees for the appeal. I'd like to avoid having to
20 file a motion on that if it's possible. I don't know if the
21 government has a position.

22 THE COURT: Mr. Tehrani?

23 MR. TEHRANI: Your Honor, I'm not sure this has to be
24 resolved right now. I think we'd like to be able to talk to
25 defense counsel about it, discuss it internally. And to the

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1 extent that there's anything that your Honor then has to
2 address, it can be brought to your Honor's attention at that
3 point.

4 THE COURT: All right. Thank you.

5 MR. DURKIN: That's fine. As long as I don't have to
6 come here to --

7 THE COURT: No, there's no need to initiate a
8 proceeding here. Just work it out with the government. If you
9 can come to an accord, the Court will grant that due
10 consideration and deference.

11 MR. DURKIN: That's fine. Thank you.

12 THE COURT: All right. Thank you. Have a good day
13 and have a good weekend.

14 MR. TEHRANI: Your Honor, before we adjourn, there
15 is a pending motion-- motion for bail pending appeal. I
16 don't know if you wanted to address that today or you wanted
17 the parties to be heard on that or how you wanted to address
18 it.

19 MR. DURKIN: I don't think the government's had a
20 chance to respond yet Judge. It's fine with me if you want
21 to --

22 THE COURT: If you want to respond. But, Mr. Durkin,
23 the Court had denied similar requests from other defendants,
24 particularly Mr. Rutigliano.

25 MR. DURKIN: No, I understand.

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1 THE COURT: What I did do in that case, as I've done
2 here, is allow a sufficient period of time between now and
3 self-surrender that you can pursue whatever applications you
4 deem appropriate at the appellate level. If the appeals court
5 gives you appeal, release during appeal, that's fine. I think
6 that's equitable treatment.

7 MR. DURKIN: The only reason I would ask, if you would
8 just at least entertain a government response, we did cite a
9 different case. There was a recent-- and this motion was
10 drafted by appellate counsel John Klein of San Francisco,
11 Judge. And he's going to do the appeal. And there's a case
12 that he had cited that I don't believe was raised in the
13 pleadings. It's a Second Circuit case that is now pending,
14 a petition for rehearing. But it does affect the venue
15 counts.

16 I'd only like to-- I'd just ask that you-- if the
17 government wants to respond, I'd like you to just consider it
18 because I don't think it's an argument that Mr. Rutigliano,
19 Mr. Ryan addressed. I don't think so. I could be mistaken,
20 but I don't think he did.

21 THE COURT: All right. Mr. Tehrani.

22 MR. TEHRANI: Your Honor, a couple of things on that.
23 We're happy to be heard on the merits today if you'd like to.
24 I would note, though, a couple of things. One is it's,
25 frankly, unclear whether this argument has been preserved by

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1 this particular defendant. But, more importantly, this was the
2 precise argument that Mr. Rutigliano made in his motion for
3 bail pending appeal. It was the motion that was denied and
4 it's now the motion that's currently pending before the Court
5 of Appeals.

6 I'd also note that Judge Wood, also in a related case
7 involving Long Island Railroad employees, denied a Rule 33
8 motion, again based exactly on this case.

9 So, again, we're happy to argue it if it would be
10 helpful for your Honor, but this is the motion that was
11 previously denied by Mr. Rutigliano.

12 MR. DURKIN: If that's the case, then I don't want
13 to --

14 THE COURT: All right. Let me call to your attention,
15 Mr. Durkin, my understanding from Mr. Rutigliano, his counsel,
16 Mr. Ryan, is that they expect to hear something, I don't know
17 exactly what, from the Court of Appeals on their request by, I
18 believe, March 12th.

19 MR. DURKIN: Okay. That's fine.

20 THE COURT: Presumably if the arguments are the same
21 and Mr. Rutigliano prevails there, then I think you would have
22 a perfect right to come back and says "me too." If, on the
23 other hand, the arguments are the same and he loses the case,
24 then that gives you a sense of what you might reasonably expect
25 here.

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1 All right. Thank you.

2 MR. DURKIN: Thank you.

3 MR. TEHRANI: Thank you, your Honor.

4 MS. FRIEDLANDER: Thank you.

5 (Adjourned)

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